

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF THE MALAD VALLEY) GROUND WATER MANAGEMENT AREA) _____)	ORDER EXTENDING TEMPORARY MORATORIUM
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BACKGROUND AND FINDINGS OF FACT

On November 4, 2015, the Director (“Director”) of the Idaho Department of Water Resources (“Department”) designated the Malad Valley Ground Water Management Area (“MVGWMA”) and established a temporary moratorium on the processing and approval of presently pending and new applications for permit to appropriate water from ground water within the MVGWMA. *See Order Designating GWMA and Establishing Temporary Moratorium*, In the Matter of the Malad Valley Ground Water Management Area (Nov. 4, 2015) (“Designation Order”). The MVGWMA was designated, and the temporary moratorium was established due to reported declines in aquifer water levels in the area. *Designation Order* at 3-4. The temporary moratorium remained in effect through November 4, 2017. *Id.* at 4.

In the Designation Order, the Director ordered that management of ground water appropriations within the MVGWMA shall be governed by a management plan to be developed with assistance from an advisory committee of representative water users and communities within the MVGWMA.

An advisory committee was assembled and met several times to draft a recommended ground water management plan for the MVGWMA. The advisory committee subsequently submitted to the Director its *Malad Valley Ground Water Management Area Draft Management Plan* (“Management Plan”).

On November 3, 2017, the Director approved the Management Plan recommended by the MVGWMA advisory committee with a few modifications. *See Order Approving Ground Water Management Plan*, In the Matter of Management of Ground Water Within the Malad Valley Ground Water Management Area (Nov. 3, 2017) (“Approval Order”).

The Management Plan and the Approval Order recommended the extension of the temporary moratorium for five years to allow for the collection of additional data to determine if extensions beyond five years are warranted in the future. The Management Plan and the Approval Order also recommended the creation of a Water Measurement District as described in Chapter 7, Title 42, Idaho Code, to include water users who divert water from any source (surface water or ground water) within the Malad Valley.

On November 3, 2017, the Director approved the order extending the temporary moratorium for an additional five (5) years. *See Order Extending Temporary Moratorium*, In the Matter of the Malad Valley Ground Water Management Area (Nov. 3, 2017) (“Moratorium

Extension Order”). The temporary moratorium remains in effect through November 4, 2022. *Moratorium Extension Order* at 3.

On November 9, 2018, the Department created the Malad Valley Water Measurement District (“MVWMD”). See *Preliminary Order Creating Water Measurement District and Requiring Installation of Measuring Devices*, In the Matter of the Proposed Water Measurement District in Administrative Basin 15 – Malad Valley (Nov. 9, 2018) (“Measurement Order”).¹ The Measurement Order created the MVWMD, effective November 4, 2019, the date designated for the first annual meeting of the MVWMD.

The MVWMD includes all ground water rights within the Malad River drainage (surface water is not included in the MVWMD), except the following:

- a. Domestic and stockwater uses as defined by Idaho Code §§ 42-111 and 42-1401(11);
- b. Irrigation uses of five acres or less;² and
- c. Non-irrigation uses where the total authorized water right rate of diversion is equal to or less than 0.24 cubic feet per second (cfs) (approximately 108 gallons per minute).³

The Measurement Order required the owners of ground water rights in the MVWMD, except those ground water rights, uses, and diversions identified in item a. through c. above, to install an acceptable measuring device on each irrigation diversion or well by the start of the 2021 irrigation season and on each non-irrigation diversion or well by January 1, 2021.

On November 4, 2019, Department staff met with ground water users at the first annual MVWMD meeting in Malad City, Idaho, to present information about the MVWMD and ground water measurement requirements. The Department announced at that meeting it would extend the deadlines for installation of ground water measuring devices in the MVWMD from 2021 to 2022.

On January 19, 2020, the Department extended the measuring device installation deadline. See *Preliminary Order Amending Measuring Device Installation Dates*, In the Matter of Requiring Measuring Devices for Ground Water Diversions in the Malad Valley Water Measurement District (Jan. 19, 2020) (“Installation Dates Order”).⁴

The Department extended the deadline for installation of ground water measuring devices in the MVWMD from 2021 to 2022. The extended deadline allowed water users more time to

¹ The Measurement Order became final when no reconsideration, exception, or request for hearing was sought.

² A common point of diversion used for multiple irrigation rights where each individual right is five acres or less must be measured if the sum of the irrigated acres pursuant to the authorized rights exceeds five acres.

³ A common point of diversion serving multiple non-irrigation uses must be measured if the total diversion rate pursuant to the authorized right(s) is greater than 0.24 cfs.

⁴ The Department received petitions for reconsideration of the Installation Dates Order signed by a total of 22 affected MVWMD water users. The Department denied the petitions. See *Order Denying Petitions for Reconsideration*, In the Matter of Requiring Measuring Devices for Ground Water Diversions in the Malad Valley Water Measurement District (Feb. 19, 2020). The Installation Dates Order became final when no exception or request for hearing was sought.

plan and budget for installation of measuring devices or flow meters and allowed additional time for the MVWMD to apply for cost-share grants or other financial assistance for purchase and installation of flow meters.

The Installation Dates Order required owners of irrigation diversions requiring measurement to install acceptable measuring devices by the start of the 2022 irrigation season. The Installation Dates Order also required owners of non-irrigation diversions requiring measurement to install acceptable measuring devices by January 1, 2022. The Department estimates that two-thirds of the users installed the required measuring devices in 2022. However, confirming compliance with the Measurement Device Order relies upon water right records. The Department commenced the Bear River Basin Adjudication in 2021 to confirm water right records, but the Department anticipates this adjudication taking a minimum of ten years to complete. The Department has partial-year 2022 diversion data from some of the wells but anticipates the diversion data set will be more complete in future years.

On August 13, 2021, Mike McVay (“McVay”), a technical hydrogeologist for the Department, completed the Malad Valley GWMA, 2020 update report (“McVay 2020 Report”). The purpose of the McVay 2020 Report “is to describe basin hydrogeology and water use, summarize the status of the Malad Valley GWMA groundwater-monitoring network, and present water-level data collected over the network’s history.” *McVay 2020 Report* at 3. In the Malad Valley GWMA, the Department currently monitors five wells. “All wells in the IDWR [the Department] network exhibit declining water levels over the period of record, and trends in wells with enough data are also declining over the most recent 20-years. Not all trends are statistically significant.” *Id.* at 23. The actively monitored well with the longest period of record (1949 to 2021) exhibits a statistically-significant trend of water level decline of -0.05 feet per year. *Id.* at 23. The other four currently monitored wells within the monitoring network exhibit declines within their period of record ranging from -0.32 feet per year to -0.02 feet per year, but the declines in these four wells are not statistically significant. *Id.* at 23. “The water level data that IDWR [the Department] collects indicate a declining resource.” *Id.* at 27. “However, the spatial coverage of the wells is generally limited to the central part of the basin.” *Id.* at 27.

On March 24, 2022, a USGS gaging station was reinstalled at the Malad River at Woodruff Idaho (Gage # 10125500) and water data collection began. Water inflow within the Malad River basin is currently estimated utilizing precipitation data. Gage # 10125500 is important for quantifying outflow from the basin so that the total consumptive use of water within the Malad Valley GWMA can be estimated.

The Moratorium Extension Order instructed the Department to “review all available data and work with the advisory committee for the MVGWMA and/or any advisory committee formed for a Water Measurement District created in the MVGWMA to evaluate the benefits and need for continuation of the moratorium.” *Moratorium Extension Order* at 2. The MVGWMA advisory committee that created the MVGWMA Management Plan is no longer active. On August 19, 2022, the Department emailed the MVWMD advisory committee members asking if they wanted to meet to discuss available data and possible extension of the MVGWMA moratorium beyond November 4, 2022. The MVWMD advisory committee members did not respond to the August 19, 2022, email meeting request. On August 22, 2022, the Department

mailed a letter informing applicants, parties, and representatives of currently pending water right permit applications and the MVWMD advisory committee members that the Department would hold a public meeting on September 8, 2022, to discuss available data and possible extension of the MVGWMA moratorium. The Department did not receive a response to the letter from the MVWMD committee members.

On September 8, 2022, the Department held a public meeting in Malad City to present information about ground water levels and aquifer concerns in the Malad Valley and to obtain public input on available data and the possible extension of the temporary moratorium. The public meeting and public comment period were advertised in *The Idaho Enterprise*, an Oneida County newspaper, on August 25, 2022, and September 1, 2022. Public notices are published in the classified section of the newspaper. Most attendees at the meeting strongly supported extension of the temporary moratorium. One attendee opposed extending the temporary moratorium and expressed a desire to develop groundwater for new consumptive irrigation use. However, this attendee did not provide information confirming additional ground water is available for consumptive use in the MVGWMA without affecting existing water rights and resulting in declining ground water levels. Department representatives at the public meeting notified the attendees that the public comment period for this matter would conclude on September 23, 2022. Attendees voiced concerns about how the public meeting was advertised and requested that future notices include a press release and be advertised in a different location within the local newspaper. The Department considered the attendees' concerns about the public meeting notice but opted not to publish additional notice. The public comment period concluded September 23, 2022. The Department did not receive any written comments.

The Department is required to send a moratorium order to the affected applicants by certified mail and publish notice of the moratorium order for three consecutive weeks per Rule 55 of the Department's Appropriation Rules (IDAPA 37.03.08.055). The Department's August 19, 2022 email, August 22, 2022 letter, August 25 and September 9, 2022 legal notices, September 8, 2022 public meeting, and the opportunity to submit written comments prior to September 23, 2022 are not legally required but represent a good-faith effort by the Department to acquire public input regarding available data and possible extension of the moratorium. However, it is common for the Department to issue press releases regarding public meetings as attendees of the September 8, 2022, meeting requested. The Department will consider issuing a press release for future MVGWMA moratorium extension public outreach efforts as suggested.

On September 9, 2022 McVay performed site visits at various well locations and secured five access agreements with landowners to add five additional wells to the groundwater-monitoring network in the MVGWMA. The Department collected water level data from the five additional wells once in 2022 and anticipates collecting a second water level measurement prior to 2023. In total, water levels will be monitored in ten (10) wells as part of the groundwater-monitoring network going forward.

As of October 31, 2022, thirteen pending applications to appropriate ground water propose to divert a total of approximately 32 cfs for irrigation of over 8,700 acres in the Malad Valley. None of the currently pending applications propose municipal use or use from a community well water system. As of October 31, 2022, thirteen permits to appropriate ground

water in the Malad Valley authorize the diversion of approximately 30 cfs for irrigation of approximately 1,700 acres in the Malad Valley. Because the holders of the thirteen permits have not filed proof of beneficial use yet, the Department has limited information about the extent of development completed for those permits. The permit holders may have expended significant resources for power lines, wells, pumps, or water distribution systems associated with those permits.

Any new appropriation for municipal use has the potential to be fully consumptive, either immediately or over time. When community well and other domestic well water systems supply water for outside use, the water used for irrigation of lawns and landscaping is largely consumed, while the indoor water use is largely non-consumptive. Municipal or community water systems may discharge unconsumed water into a sewer treatment facility. Sewage disposal may include evaporation from a retention facility, land application, or treatment and re-use rendering the use fully consumptive. The Moratorium Extension Order exempted domestic uses meeting the definition of Idaho Code § 42-111 from the moratorium. However, any new appropriations for consumptive use of ground water within the MVGWMA may result in further ground water level declines and reduce aquifer storage and the ground water supply for existing ground water users in the MVGWMA.

The Designation Order established a moratorium for a period of two (2) years, followed by the Moratorium Extension Order for an additional five (5) years. Another extension of five (5) years will give the Department time to collect additional water level data and to develop an understanding of water level changes in the current and new monitoring wells. An additional five (5) years of data from the Malad River at Woodruff Idaho gage station will assist the Department in estimating basin outflow. The Bear River Basin adjudication and anticipated water user claims will provide more accurate water right records. The Department relies upon accurate water right records in making water use calculations and determining compliance with measurement device orders. The Department requires a sufficient record of water level data along with an accurate record of water use to complete a defensible water budget for the MVGWMA.

CONCLUSIONS OF LAW

1. The temporary moratorium was established pursuant to Idaho Code § 42-1805(7) and Rule 55 of the Department's Water Appropriation Rules (IDAPA 37.03.08.055) to protect existing ground water rights and to protect the aquifer from depletion.
2. The Department made a good faith effort to meet with the MVWMD advisory committee to discuss available data and possible extension of the MVGWMA moratorium in conformance with the Moratorium Extension Order.
3. At the request of the MVGWMA ground water users, the Department extended the deadline to install diversion measuring devices to 2022. Therefore, the Department could not collect the necessary diversion data to inform the Department's water supply assessment for the MVGWMA.

4. Limited ground water data suggests a declining resource. With limited data there is some uncertainty as to the extent of the decline. The addition of five wells to the existing groundwater-monitoring network will provide additional ground water level data for analysis.

5. The USGS gaging station measurements collected at the Malad River at Woodruff Idaho and the installation and record keeping of measuring devices on diversions will assist in quantifying outflow from the basin to allow for estimations in consumptive use to be calculated within the Malad Valley GWMA.

6. The moratorium should be extended, for a period of five (5) years, to allow for increasing the period of record of data collection and for new data to be collected and analyzed to determine if extending the moratorium further is warranted.

ORDER

IT IS HEREBY ORDERED, pursuant to Idaho Code § 42-1805(7) and IDAPA 37.03.08.055 (Water Appropriation Rule 55), that the order dated November 4, 2015, establishing a temporary moratorium on the processing and approval of presently pending and new applications for permits to appropriate water from ground water within the MVGWMA **is extended for five (5) years, from November 4, 2022**, unless rescinded or modified by order of the Director or a court of competent jurisdiction. New and pending applications to appropriate water in the area subject to the moratorium shall be held without further processing unless they meet one or more of the exceptions stated in this order. The following provisions apply to the administration of the moratorium:

1. The moratorium does not change or affect the authorization to continue development of any existing approved permit to appropriate water.

2. The moratorium does not apply to any appropriation of ground water by beneficial use pursuant to Idaho Code § 42-227 for domestic purposes, including livestock water, as such term is defined in Idaho Code § 42-111.

3. The moratorium does not apply to any application proposing a non-consumptive use of water as the term is used in Idaho Code § 42-605A. This exception to the moratorium shall not apply to applications for non-consumptive uses of water that will reduce the supply of water available to existing water rights because of the location or timing of return flows. Applications for ground water recharge shall be evaluated on a case-by-case basis to determine whether the proposed use is non-consumptive and whether it will reduce the supply of water to holders of existing water rights with priority dates senior to the priority date of the application. Applications for municipal water use and for domestic use from community water systems shall be considered fully consumptive. Applications for domestic purposes from non-community water systems and applications for stock watering shall be evaluated on a case-by-case basis to determine whether the proposed use is non-consumptive. Irrigation proposed in connection with a domestic use will be considered consumptive. Domestic, commercial, industrial, or other water uses that result in the discharge of wastewater to a municipal or publicly owned treatment works will be considered consumptive.

4. This moratorium does not apply to applications for drilling permits to replace or deepen existing wells authorized by valid existing water rights.

5. This moratorium does not apply to applications for transfer, including applications to add points of diversion to valid, existing water rights.

6. This moratorium does not prevent the Director from reviewing for approval on a case-by-case basis an application which otherwise would not be approved under the terms of this moratorium if:

- a. Protection and furtherance of the public interest, as determined by the Director, requires consideration and approval of the application irrespective of the moratorium; or
- b. The Director determines the development and use of the water pursuant to an application will have no effect on prior surface and ground water rights because of its timing, location, insignificant consumption of water, or mitigation provided by the application to offset injury to other water rights.

IT IS FURTHER ORDERED that before this moratorium expires, the Department shall review all available data and work with the MVWMD advisory committee to evaluate the benefits and need for continuation of the moratorium.

IT IS FURTHER ORDERED that the Department shall serve a copy of this order by certified mail upon holders of applications for permits proposing appropriation of ground water within the MVGWMA and shall publish notice of this order for three consecutive weeks as required by IDAPA Rule 37.03.08.055 (Water Appropriation Rule 55).

IT IS FURTHER ORDERED that this order shall be effective on November 4, 2022.

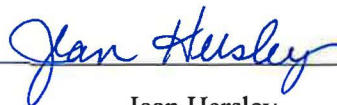
Pursuant to Idaho Code § 42-1701A(3), any person aggrieved by any decision, determination, order or other action of the Director, and who has not previously been afforded an opportunity for hearing on the matter, shall be entitled to a hearing before the Director to contest the action. The person shall file with the Director, within fifteen (15) days after receipt of written notice of the action issued by the Director, or receipt of actual notice, a written petition stating the grounds for contesting the action by the Director and requesting a hearing.

Dated this 3rd day of November 2022.


Gary Spackman
Director

CERTIFICATE OF SERVICE

I hereby certify that on November 4, 2022, I mailed a true and correct copy, certified, postage prepaid of the foregoing **(ORDER EXTENDING TEMPORARY MORATORIUM)** to the person(s) listed below:



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I hereby certify that on November 4, 2022, I mailed a true and correct copy, postage prepaid of the foregoing **(ORDER EXTENDING TEMPORARY MORATORIUM)** to the person(s) listed below:



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